No. 96-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR INC., *Petitioner*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Brief in Opposition highlights the fundamental issue that employers and unions need this Court to address: When, if ever, may an employer pay a full-time union official for being a full-time union official? Although section 302(c)(1) of the Labor Management Relations Act allows an employer to pay a union official only for his "service as an employee," 29 U.S.C. § 186(c)(1), the Respondents (hereinafter "the Union") and a majority of the Third Circuit believe an employer may pay the salary of an individual who entirely leaves his job in order to serve, perhaps for years, as a full-time union official.

The Union concedes that the determinative issue turns on the interpretation of this substantive test: whether payments are "by reason of . . . service as an employee." Resp. at 6. Though making that concession, the Union tries to conceal the lower court disarray concerning the meaning of that statutory requirement by limiting every relevant precedent to its facts.[1] Nowhere in its brief, however, does the Union deny that the lower courts have adopted four different interpretations of that test. Rather, the Union dismisses the fundamental disagreement as mere "variations in style and explanatory emphasis." Resp. at 9.[2]

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[1] For example, the Union implies that the Eleventh Circuit found the benefits at issue in *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), unlawful because they were granted *secretly* outside the *collective bargaining agreement*. Resp. at 7-8, 9. Those factors were relevant, however, because they showed that the right to the benefits had not vested before the employee left his regular job, 19 F.3d at 1575—a requirement deriving from *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir. 1986).

[2] The disagreement is more than ornamental. To rely on *Phillips*, the Third Circuit had to formulate the fiction that wage payments to union officials are a vested benefit purchased by em-

(continued...)

Despite the Union's obfuscation, the Third Circuit's decision perverts, rather than follows, existing precedent and dangerously expands the scope of permissible employer subsidies to unions. Review in this case is crucial because the Third Circuit has now so attenuated and trivialized the substantive test of section 302(c)(1) that, as Amicus Council on Labor Law Equality notes, the statutory exception now threatens to "swallow[ ]" the ban on employer payments itself. *See* Br. at 11. It warrants repeating again here: This case is the first in which any court of appeals has ever approved the payment of full-time wages to full-time union officials who are no longer employed by the payor and who perform absolutely no work for it.

1. Relying on *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046 (2d Cir. 1986), the Union continues labor's crusade to eviscerate the phrase "by reason of . . . service as an employee." In its brief to the Second Circuit in *BASF*, the union there argued that under section 302(c)(1) the only question was whether the union officials receiving payments are "*bona fide* employees." Brief of Appellee at 9, *BASF*, 791 F.2d 1046 (No. 85-7214). But that inquiry is just the starting point. Determining that a paid union official is "also an employee or former employee," 29 U.S.C. § 186(c)(1), merely establishes that the *substantive* test of section 302(c)(1) may be applied to the payments. Under that test, payments to a union official who is also an employee or former employee are legal *if and only if* they are for his "service as an employee" rather than his service as a union official. *See* Pet. at 11 n.12.

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[2] (...continued)

ployees with a wage cut. In citing *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir. 1989), the Third Circuit in this case dispensed with *Toth*'s own warning that payments had to be commensurate with past service. *Id.* at 1305.

Despite the foregoing, the Second Circuit, accepting the union's argument in that case, asked only the preliminary question in *BASF* and disregarded the *substantive* test. While the Second Circuit's oversight was of limited import given the narrow facts and unique statutory considerations of "no-docking" policies applicable to active workers,[3] the Third Circuit's decision below seriously compounds that error by effectively eliminating the substantive test even when dealing with full-time officials who were, at most, former employees at some point in the past.

2. The Union attempts to conceal this compound error by insisting that this case involves just another type of "no-docking" policy. The Union and a majority of the Third Circuit perceive no difference between allowing a regular worker, without loss of pay, to take some time during a workday to perform a union activity and, in contrast, providing wages and benefits to a full-time union official who performs absolutely no work for the employer. For the Union and the Third Circuit majority, the requirement that the pay be *for* "service as an *employee*" is satisfied in the latter instance by the mere fact that the union official happened to have once worked for the employer. On that view, any difference between a "no-docking" policy and indefinite paid leave is merely a matter of degree. Indeed, the Union describes *both* arrangements as "no-docking" policies, even though what an employer is supposedly not "docking"

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[3] Section 302 literally prohibits "no-docking" policies, and although another provision of federal labor law contemplates a very narrow "no-docking" rule, that provision applies only to *employees*. 29 U.S.C. § 158(a)(2). Some courts have relied on the latter provision to carve a limited exception into section 302 for "no-docking" policies applicable to current employees. *See Employees' Indep. Union v. Wyman-Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970) (upholding policy allowing attendance at monthly grievance meetings without loss of pay).

in the latter situation is the union official's *entire*, full-time salary, potentially continuing over a period of years and unaccompanied by any kind of ongoing "service as an *employee*."

Other courts, however, do not accept the Union's conflation of "no-docking" policies and indefinite paid leave. In approving a "no-docking" arrangement in *BASF*, the Second Circuit observed that such arrangements were by their very nature applicable *only* to current employees, 791 F.2d at 1049 n.1. They are not equivalent to "simply put[ting] a union official on the . . . payroll while assigning him no work," because such an official would not be a bona fide employee within the meaning of the statute. *Id.* at 1050; *accord NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986) (expressly disclaiming legality of wage payments to full-time union officials who perform no work for employer); *Toth*, 883 F.2d at 1305 (same). True, the Second Circuit did not specifically address whether it would approve of *leaving* a union official on an employer's payroll once he had stopped performing any work for the employer, but the court clearly would not have categorized that practice as a "no-docking" policy. *See id.* at 1049 n.1.[4]

In short, the Third Circuit is *not* just bringing itself into line with other precedent, as the Union suggests.

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[4] Likewise, the Departments of Justice and Labor recognize that a "no-docking" policy presents different considerations from indefinite paid leave. Below, they argued that payments to a union official who is a former employee would be considered lawful *if* the official is elected from the bargaining unit, and the payments are commensurate with his former position and are limited to his role in the grievance process. *See* Pet. at 16-17. The United States also sought "close scrutiny" if the official negotiates the payments or if he had not been a long-time employee and probably will not return to regular work. *Id.* at 17.

3. Far from merely seeking to "gain leverage" in a labor dispute, as the Union suggests, Caterpillar initiated this suit only *after* the Union demanded that it pay union officials for even *more* hours of union activity at even *higher* rates of pay. Petitioner asks this question on behalf of itself and other employers: Where *is* the line to be drawn? If Congress had wanted to prohibit only actual instances of bribery, extortion, and corruption, it would not have enacted a *malum prohibitum* statute broadly forbidding conflicts of interest. Did Congress really determine that some period of former employment, however brief, cleanses *all* bargained-for payments, whatever the amount, yet simultaneously believed that *all* payments to a union official who has not been employed by the payor, regardless of circumstance, are corruptive? Is a stranger more likely to be unduly influenced or his union become more dependent than a former employee and his union? The line proposed by the Union and accepted by the Third Circuit majority is simply not rational.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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